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Published in:
German Yearbook of International Law

DOI:
10.3790/gyil.63.1.621

Published: 01/01/2022

Document Version
Submitted manuscript

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Link to publication

Please cite the original version:
Rouleau-Dick, M. (2022). A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta. *German Yearbook of International Law*, *63*(1), 621-646. https://doi.org/10.3790/gyil.63.1.621

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A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta

Abstract

This article examines the relevance of the Sovereign Military Order of Malta as a precedent for safeguarding the legal existence of Low-Lying Island States threatened by climate change and the rise in sea levels. The unprecedented nature of this phenomenon means international law offers no unequivocal guidance on the way forward for the threatened States. As a result, most solutions to the problem rely either on the creation of new legal instruments, the reinterpretation of existing norms, and to varying extents, on the goodwill of other States. However, due to its State-like characteristics and existence independent from a territorial claim, non-state sovereign entities of international law such as the Sovereign Order of Malta could provide an interesting blueprint for a low-lying island nation to transit towards once the indicia of statehood becomes vulnerable to possible challenges. The core of the Sovereign Order of Malta's sovereignty is discussed and outlined, followed by a survey of the relevance and added value of this option for threatened low-lying island States.

Keywords: low-lying states, sovereign military order of Malta, non-state sovereign entity of international law, climate change, relocation, international legal personality

N.B. This is a pre-print (i.e., before review) version of an article that will be published in volume 63(2020) of the German Yearbook of International Law (https://elibrary.duncker-humblot.com/journals/gyil).

A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta

I. Introduction

Climate change presents an unprecedented threat to humanity and the international community. From increasing the likeliness of extreme weather events to slow-onset disasters such at the rise in sea levels, the time for debates on the reality or not of climate change is long gone.

With highest elevations points below ten meters, States such as the Maldives, Tuvalu, or the Marshall Islands are in a particularly precarious position and might find themselves deprived of a territory within the next few decades.[1] Despite having made only negligible contributions to greenhouse gas emissions, up to 40 States face a threat to their very existence.[2] However, contrary to most previous crises that the international community has faced before, we are still in a position to hopefully prevent, or at least mitigate the possible consequences of this upcoming crisis. However, the window of opportunity to build such preparedness is narrowing quickly.[3]

Urgency and the inherent complexity of creating bespoke legal solutions to the respective problems of the threatened nations call for solutions that can draw on precedents and existing legal frameworks rather than rely on the solidarity of the international community, a rare commodity today, and *a fortiori* in a climate-changed world. In keeping with this logic, the present article examines the possibility of a threatened Low-lying island State (LLIS) transitioning into a non-State sovereign entity of international law (NSSEIL)[4] such as the

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[1] Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States* (2011), at 1–2.

[2] *Ibid.*

[3] Christina Voigt, 'ANZSIL Conference Keynote 2019 Climate Change, the Critical Decade and the Rule of Law', 37 *Australian Year Book of International Law* (2020) 50, at 50.

[4] The use of this term in the present article is based on its use by Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future', in Petra Butler and Caroline Morris (eds.), *Small States in a Legal World* (2017) 101.

Sovereign Military Order of Malta (SMOM) in order to preserve its international legal personality beyond the possible loss of its territory.

Exploring this option first requires surveying the challenges faced by LLIS and assessing some of the solutions proposed as remedies. The second step in the process explores the position of the Order of Malta in international law. While admittedly descriptive in nature, this step is crucial to understanding the value of the Order's position for LLISs. Last, the Order's peculiar status and the prerogatives it entails are discussed as a potential framework for maintaining the legal personality of LLISs beyond the loss of territorial indicia.

II. The Problem

Were a State to lose its territory in its entirety, the legal implications would be substantial due to the heavy reliance of the traditional definition of statehood on the notion of territory and territorial sovereignty.[5] Indeed, international law's occasional reliance on physical features might become more of a curse than a blessing. For instance, the choice of coastlines as the basis on which to determine the exclusive economic zone (EEZ) pertaining to a State was intended to provide an elegant, factual solution to clarify the often-controversial disputes over the definition of territorial waters between neighbouring States. The assumption at the time was that coastlines constituted an uncontroversial, undisputed fact of nature, which could provide a solid fact-based basis to solve legal disagreements. Climate change has, and will increasingly change that.[6]

In the case of low-lying island States, which share a common vulnerability to the rise in sea levels, this threat is an existential one. The changes in the earth's climate could mean the eventual complete disappearance of their territory and force the cross-border migration of their population. Though the exact nature of the threat, as well as the form it might take, is complex and can best be explained with the tools of disciplines other than law, the legal implications of this phenomenon are wide-ranging, and worth discussing prior to its occurrence in order to mitigate uncertainty and potential harm.

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[5] Although it does not provide unambiguous guidance on statehood, it is usually considered that Article 1 of the 1933 Montevideo Convention reflects customary international law on this subject. *See* Montevideo Convention on the Rights and Duties of States 1933 (1934) 165 LNTS 19.

[6] *See* for instance Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs', 4 *Climate Law* (2014) 70.

Problems arise in this context mostly due to the traditional understanding of statehood, which is very much territory-centered: States have always been primarily territorial entities,[7] a different colour on the world map.[8] Though numerous States may have ceased to exist in the past, their territory and population remained, and a body of norms on the succession of States regulates the transition from old to new. The situation of LLISs is different, and, questions thus arise concerning the way forward. Could a State retain its statehood despite losing the physical elements of statehood?

A. Palliative Versus Pre-Emptive

While this is far from being a settled debate,[9] this article chooses to adopt a worst-case scenario approach to the question, assuming that the law on statehood would be applied restrictively to the case of LLISs, possibly resulting in challenges to their statehood. Although this is not a foregone conclusion, the present article adopts a 'hope for the best, prepare for the worst' approach. The following arguments are certainly not without flaws, but they aim to avoid relying on the good will of other members of the international community, as opposed to different approaches to the problem proposed by other scholars.[10]

Options proposed to allow for the continued existence of a deterritorialised LLIS cover a wide spectrum of solutions, from *in situ* adaptation to merger with another State. Burkett, for instance, argues in favour of a trusteeship-inspired solution to maintain the existence of LLISs

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[7] Derek Wong summarizes the need for territory as part of statehood as such: 'territory is a leg upon which the state must be created; the leg may be bent, but it must exist.' *See* Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law', 14 *Melbourne Journal of International Law* (2013) 346, at 354.

[8] Karen Knob, 'Statehood: Territory, People, Government', in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), at 95.

[9] In fact, due to the absence of authoritative guidance or State practice on the subject, there exists several conflicting opinions on the continued statehood for a deterritorialised LLIS. For competing opinions, see for instance Heather Alexander and Jonathan Simon, 'Sinking into Statelessness', 19 *Tilburg Law Review* (2014) 20 , at 25., and Jane McAdam, ''Disappearing States', Statelessness and the Boundaries of International Law', 2010–2 *University of New South Wales Faculty of Law Legal Studies Research Paper Series* (2010) 1.

[10] While not being overly cynical, one must acknowledge the influence of unpredictable external factors on the interpretation and implementation of international law, and particularly on the law on statehood. Reliance on the implicit assumption that international law represents progress should also be addressed with a healthy dose of scepticism, as it tends to be more porous to political matters than one might wish. *See* Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', 26 *International Relations* (2011) 3.

beyond the loss of their territory, as well as on the need to reshape the notion of statehood.[11] *En masse* relocation schemes, involving the resettlement of vulnerable populations to the territory of another State have also been envisaged by some of the threatened States such as Kiribati.[12] McAdam underlines the possibility of implementing a system of self-governance in free association with another State, such as is the case with the current relationship between the Cook Islands and New Zealand, for instance.[13] A more radical option, consisting of a full merger of the former LLIS with another sovereign State, has also been mentioned as a means to safeguard the former State's population through framing the transition into a case of succession of States.[14] Additionally, ad hoc solutions such as bilateral or multilateral agreements could provide a bespoke framework of protection to safeguard the rights of the threatened populations.[15]

On a broader level, the possibility of creating a new and dedicated framework of protection for those forced to cross borders due to climate change has also been proposed. The inadequacy of the current refugee law framework certainly seems to support the need for such an instrument.[16] However, the current political context presents a major obstacle to any development in this direction. Even within the current framework, problems of implementation can be attributed mostly to a lack of political will, not to a lack of legal provisions.[17] Hostility towards migrants, in conjunction with a trend of increasingly framing migration as a security issue,[18] creates a climate unfavourable to effective legal developments. Convincing States to enter additional obligations with regards to environmentally displaced

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[11] Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', 2 *Climate Law* (2011) 345.

[12] Jane McAdam, *Climate Change, Forced Migration, and International Law* (2012), at 144–145. *See also* Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State', 16 *International Journal on Minority and Group Rights* (2009) 209, at 214–215.

[13] Oliver, *supra* note 12, at 154. *See also* Zbigniew Dumienski, 'Shared Citizenship and Sovereignty - The Case of the Cook Islands' and Niue's Relationship with New Zealand', in Steven Ratuva (ed.), *The Palgrave Handbook of Ethnicity* (2019) 221.

[14] Park, *supra* note 1, at 18.

[15] *Ibid.*, at 19.

[16] Sumudu Anopama Atapattu, 'A New Category of Refugees? 'Climate Refugees' and a Gaping Hole in International Law', in Simon Behrman and Avidan Kent (eds.), *'Climate Refugees' Beyond the Legal Impasse?* (2018) 287, at 40–43. *See also* McAdam, *supra* note 12, at 42–48.

[17] McAdam, *supra* note 12, at 199. *See also* Atapattu, *supra* note 16, at 45–47.

[18] *See* Likim Ng, 'Securitizing the Asylum Procedure: Increasing Otherness through Exclusion', 15 *No Foundations* (2018) 23.

persons would likely present a sizeable challenge, one that has the potential of backfiring in States, possibly putting into question their current commitments on refugee protection.

Some of the proposals mentioned above also imply significant challenges. Self-governance within another State for instance, would require this State to agree to the creation of such a framework, and consequently cover some of the costs and assume the responsibilities involved. Options such as the formal acquisition of land from another State would also rely on the willingness of another State, as a formal cession would also require a complete change in sovereignty over the territory in question, different from a private transaction.[19] McAdam evaluates the likeliness of this happening as remote.[20] In fact, most of the current putative solutions identified in the literature rely to some extent on the goodwill of at least one member of the international community. Within the context of a worst-case scenario approach to the problem, it is thus critical to identify options minimizing reliance on hypothetical good Samaritans.

Furthermore, some of the mentioned solutions adopt a resolutely pre-emptive approach to migration due to climate change, which is indeed needed to mitigate the potential harm caused as much as possible. However, in the event that these could not be implemented, there is also a clear need to look at palliative approaches. While every LLIS's situation is unique and presents its own challenges, it is essential to look for options that can be enacted even if other solutions fail. This might prove relevant, even if only to help dissipate the uncertainty surrounding the legal personality of the affected LLIS.

Although many questions remain unanswered, an anomaly of international law might provide a promising path to a solution, one which might allow an LLIS to secure some level of legal personality even beyond the possible loss of its statehood. This anomaly stems from the existence of two entities, which, despite sharing a number of common characteristics with States, do not possess full statehood, yet still interact with States essentially on an equal basis: the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta[21], and the Holy See. Though both entities arguably belong to the same category of

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[19] This could also be made more complex by some States not allowing such a cession of territory. Norway for instance, found itself in the impossibility of gifting part of a mountain to Finland due to Norwegian territory being indivisible under the country's 1814 constitution. *See* BBC, *Norway Will Not Give Halti Mount Summit to Finland*, 14 October 2016, BBC, available at https://www.bbc.com/news/world-europe-37662811.

[20] McAdam, *supra* note 12, at 149.

[21] Hereinafter referred to as the Order, the Order of Malta, or the Sovereign Military Order of Malta (SMOM).

international actors, the focus of this article will be primarily (though not exclusively) on the situation of the Sovereign Military Order of Malta, since, as opposed to the Holy See, the SMOM lacks any links to either a territory or a population.[22]

III. The Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta

The Sovereign Military Order of Malta was created by Italian merchants in 1042, with the intent of caring for poor Christian pilgrims on their way to the holy land.[23] Gaining official recognition in 1113, it is the oldest surviving order of its type. Initially exclusively dedicated to its humanitarian mission, the Order's role expanded to encompass a variety of other activities, notably becoming a prominent military power in the region. With the loss of the holy land, the Order of Malta temporarily relocated to Cyprus, leaving in 1310 when it settled on the island of Rhodes.[24]

After a long siege in 1523, the Order of Malta was ousted from Rhodes by the Ottoman Empire. It remained landless until Charles V, Emperor of the Holy Roman Empire granted the island of Malta to the Order. There, it successfully withstood another siege by the Ottomans, until it lost its territorial possessions to the victorious armies of Napoleon in 1798.[25] While the Order hoped to regain control over its former possession after the defeat of the French emperor, the United Kingdom retained sovereignty over Malta from the Vienna Congress in 1814[26] until the island eventually became independent in 1964.

The Order has thus remained landless since 1798. Its headquarters relocated to Rome following the loss of Malta and has remained there since.[27] With the loss of its territorial possessions, the Order has instead emphasized its humanitarian mission, which has been at the

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[22] Debate over the Holy See's exact nature and situation in relation to the Vatican also affects the usefulness of its situation for the purpose of the present article. *See*, for instance, Jason J. Kovacs, 'The Country Above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta', 11 *National Italian American Bar Association Journal* (2003) 27, at 42.

[23] Charles D'Olivier Farran, 'The Sovereign Order of Malta in International Law', 3 *International and Comparative Law Quarterly* (1954) 217, at 219.

[24] *Ibid.*

[25] *Ibid.*, at 220.

[26] Eduard Ivanov, 'Mission of the Order of Malta as a Subject of International Law in the 21st Century', 2014 *Higher School of Economics Research Paper* (2014) 1, at 6.

[27] Kovacs, *supra* note 22, at 39.

core of its existence since its foundation. In practice, this has meant that the Order has been at the centre of humanitarian relief in natural disasters, wars, and conflicts, actively providing care and maintaining healthcare facilities for treating the wounded, while keeping a strict neutrality.[28]

Throughout its existence, the SMOM has maintained diplomatic relations with States, even after the loss of its territory.[29] In fact, the peculiar status of the Order, removed from territorial claims, is precisely what makes it worth examining. Before looking further, however, the question of what exactly the Order is must be addressed. Due to its peculiar status and history, the SMOM has remained relatively under-studied in English language scholarship. With the exception of a few cases in Italian courts and occasional articles, the last time the SMOM attracted any attention was when the Holy See attempted to clarify the Order's status through a Cardinalitial tribunal. This relative obscurity may be undeserved however, as the Order's legal personality is a fascinating subject of inquiry.

A. Nature of the Order's Legal Personality

Arguably self-evident in most cases such as with well-established States, the exact contours of the ability to participate in international law-making and to be an integral part of the international legal system is highly dependent on one's understanding of the concept.[30] This understanding has evolved substantially, from ILP defined as being an exclusive synonym of statehood to the elaboration of definitions based instead on agency at the international level.[31]

While there are several competing conceptions of precisely which entities enjoy international legal personality, this article adopts the conventional understanding that legal personality is derived from either explicit or implicit recognition by States of its existence in an entity. Within this understanding of ILP, States are thus the primary persons of international law.

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[28] This neutrality finds its source in the initial conditions to the Order's possession of Malta. Charles V insisted on making the perpetual neutrality of the SMOM in conflicts between Christian princes a condition for the Order's ownership of the Maltese archipelago. *See* D'Olivier Farran, *supra* note 23, at 220.

[29] Kovacs, *supra* note 22, at 39.

[30] Nijman, for instance, highlights how the concept of ILP tends to be defined in relation to a specific context and varies in substance depending of the purpose of the inquiry. *See* Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (2004), at 25–27.

[31] Roland Portmann, *Legal Personality in International Law* (2010).

Although other conceptions of international legal personality might accommodate a wider scope of legal personality,[32] the more restrictive 'recognition conception' and its correspondingly higher threshold for ILP can still be satisfied relatively easily by the SMOM. This analysis therefore does not require adopting a wider discussion of the concept. Rather, as its legal personality is demonstrated clearly below, through the Order's extensive interactions with States, the focus of this article is on the substance and scope of the Order's ILP and its applicability to the case of a hypothetical deterritorialised low-lying island State.

Authors have employed a number of different terms to describe the Order's position within the international order, including *sui generis* entity of international law, non-State subject of international law, or as used in this article, non-State sovereign entity of international law (NSSEIL).[33] The length and elements of this terminology highlight three key characteristics of the Order of Malta:

a. First, it is not a State, despite exhibiting several State-like characteristics;
b. Second, it detains some level of sovereignty;
c. Third, it enjoys legal personality on the international level.

Conversely, besides not being a State, the SMOM also does not belong to the category of governments or monarchs in exile. While this claim may have had merit immediately after the events, it can be unequivocally dismissed in the present context since the Order maintains diplomatic relations with Malta and has relinquished any claim to its former territory. Hence, describing the SMOM as an exiled monarch or government in exile would be inaccurate. Its existence is permanent and stable, not reliant on a claim to an occupied territory.

This absence of a territorial link further highlights the fact that the Order of Malta is not a State, even if it occasionally behaves like one. Contrary to States, which possess *general*

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[32] While other conceptions of ILP might allow for a LLIS to maintain legal personality beyond the loss of physical existence, the present article will not discuss this possibility, as this discussion would require more than a few paragraphs. Furthermore, even if a deterritorialised LLIS were to retain its statehood, the precedent set by the SMOM would still retain much of its relevance as a blueprint for legal personality beyond the loss of territory.

[33] The European Union (EU) defines the SMOM as a 'sui generis subject of public international law', *see* European Union, *The Order of Malta and the EU*, 6 February 2020, European Union External Action, available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/2381/The%20Order%20of%20Malta%20and%20the%20EU. *See also* Malcolm N. Shaw, *International Law* (7th ed., 2014), at 178.

international personality, the Order of Malta possesses what can be described as *particular* international personality.[34]

The Order maintains formal diplomatic ties with 110 States, as well as official relations with five other States and the European Union.[35] The Order of Malta possesses the ability to issue its own postage stamps, and some of its officials hold diplomatic passports in the Order's name and enjoy diplomatic immunity.[36] However, the Order does not have citizens as such. The Order's headquarters in Rome and its embassies throughout the world enjoy extraterritoriality. The SMOM has entered into international agreements,[37] although all have been related to its mission of humanitarian relief. Additionally, since 1994, the Order has had the status of non-State permanent observer to the United Nations.[38] These extensive interactions with States underline their recognition of the Order's legal personality. Its ability to enter into binding agreements with States further establishes the SMOM international law-making capacity.

As the Order has existed in its current form since the conquest of Malta, it has been able to maintain its ILP even at a time when this status was generally considered the exclusive privilege of States, reflecting the then predominant States-only conception of ILP in the Grotian tradition.[39] Even as legal personality has evolved to become 'acquired through recognition by states' [40], such recognition has confirmed the position of the Order in international law-making, with the caveat of being limited in scope by the order's particular mission. This caveat results in the Order's status essentially being a watered-down version of

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[34] James Crawford, *The Creation of States in International Law* (2nd ed., 2006), at 30.

[35] Sovereign Order of Malta, *Bilateral Relations*, Sovereign Order of Malta, available at https://www.orderofmalta.int/diplomatic-activities/bilateral-relations/.

[36] Royal Curia of the Kingdom of Hungary (*Magyar Királyi Kúria*), *Case No. 798/1943*, 12 May 1943.

[37] For instance, a cooperation agreement between the Republic of Poland and the Order of Malta, concluded on 14 July 2007, cited by Karol Karski, 'The International Legal Status of the Sovereign Militarry Hospitaller Order of St. John of Jerusalem and of Malta', 12 *International Community Law Review* (2012) 19 , at 25. or another cooperation agreement between the Order and Hungary, *see* Sovereign Order of Malta, *International Cooperation Agreement between Hungary and the Order of Malta*, 11 March 2011, Sovereign Order of Malta, available at www.orderofmalta.int/2011/03/11/international-cooperation-agreement-between-hungary-and-the-order-of-malta/?lang=en.

[38] Permanent Observer Mission of the Sovereign Order of Malta to the United Nations, *About*, available at www.un.int/orderofmalta/about.

[39] Lauri Mälksoo, 'Contemporary Russian Perspectives on Non-State Actors: Fear of the Loss of State Sovereignty', in Jean d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011) 126, at 126–127. *See also* Portmann, *supra* note 31, at 43.

[40] Portmann, *supra* note 31, at 118–119.

that of States, rendering it both unattractive and difficult to obtain as a means of gaining or retaining international legal personality. This may explain why NSSEILs are so few and why the SMOM has not attracted more attention.

While recognizing that the concept of international legal personality is both a theoretical battleground and a concept of limited use in practical terms this cursory overview seeks to demonstrate that the Order's extensive interactions with States should provide factual proof of the Order's agency and law-making capabilities at the international level. Alternatively, the concept of sovereignty will be used as a vehicle to further discuss the extent of the Order's prerogatives. This choice is motivated by the concept's narrower scope and widespread use in literature discussing the SMOM.[41]

B. Sovereignty of the Order

Crawford defines sovereignty as follows:

> In its most modern usage, sovereignty is the term for the "totality of international rights and duties recognized by international law" as residing in an independent territorial unit – the State. It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition). It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence.
>
> (…)
>
> As a legal term "sovereignty" refers not to omnipotent authority - the authority to slaughter all blue-eyed babies, for example – but to the totality of powers that States may have under international law. [42]

The concept might thus appear inadequate for the purpose of describing an entity such as the SMOM, as sovereignty here is so closely intertwined with statehood. Used separately from statehood, however, the notion of sovereignty can still provide a useful background to outline the legal personality of the Order and help define its scope under international law. In a 1935 case, the Italian court of cassation defined the Order's sovereignty as:

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[41] Kovacs, *supra* note 22, at 28. *See also* D'Olivier Farran, *supra* note 23, at 223.

[42] Crawford, *supra* note 35, at 32–33.

> a complex notion which international law, from the external point of view, contemplates, so to speak, negatively, having only in view independence vis-à-vis other States. For this reason it is sufficient to require merely proof of the autonomy of the Order in its relation to the Italian State. … Such attributes of sovereignty and independence have not ceased, in the case of the Order, at the present day – at least not from the formal point of view in its relation with the Italian State. Nor has its personality in international law come to an end, notwithstanding the fact that such personality cannot be identified with the possession of territory.[43]

More succinctly, Koskenniemi's summary is perhaps more helpful to encapsulate (external) sovereignty, defined as 'the legal position of the State *vis-à-vis* other States.'[44] Here, one may rephrase the Order's unique sovereignty as the legal position of the SMOM *vis-à-vis* States. It is both a requirement and a consequence of the Order's ability to interact with other sovereign entities of international law on its own behalf.

The SMOM is not an international organisation and thus does not owe its existence to an initial agreement. Its State-like prerogatives seem to be due partly to what can only be described as sovereignty, i.e. *de facto* and *de jure* recognition by other States through the numerous interactions of the Order with members of the international community. What, then, lies at the root of the Order's sovereignty? This article adopts a two-pronged approach to evaluating the source of the SMOM's sovereignty, conflating its functional root with the transformative influence of a former claim to territory.

C. Functional Root

Throughout its history, the Order of Malta has had humanitarian relief as its primary mission. The importance of the Order's humanitarian activities, as well as the requirements of such a mission, particularly in wartime, are usually thought to lie at the core of the Order's peculiar international personality. This mission is described by the Order itself as:

> [..] caring for people in need through its medical, social and humanitarian works. Day-to-day, its broad spectrum of social projects provides a constant support for forgotten or excluded members of society. It is especially involved in helping people living in the midst of armed conflicts and natural disasters by providing medical assistance, caring for refugees,

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[43] Hersch Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1935-1937* (1941), at 2–7.

[44] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 241.

> and distributing medicines and basic equipment for survival. Across the world, the Order of Malta is dedicated to the preservation of human dignity and the care of all those in need, regardless of their race or religion.[45]

As Breycha-Vauthier elegantly explained it in 1954, the Order's sovereignty is both a condition and a consequence of its mission[46]. This is because the Order's role in armed conflicts required neutrality, and effectively created a need for sovereignty in order to fulfill its role. Arguably, if the Order's mission had not required such sovereignty, the Order's legal personality would be different or inexistent.

In practice, this mission has acted as an anchor point, which means, conversely, that the Order's sovereignty is essentially confined to activities relating to its mission. This is illustrated by Italian case law on the immunity of the Order.[47] Italian courts have consistently found cases relating to the Order's activities to fall within the Order's diplomatic immunity, with the scope of those activities acting as an outer boundary to the immunity in question. A good example of such a situation is the case *Association of Italian Knights of the Sovereign Military Order of Malta* v. *Guidetti* .[48] Here, the Italian court found that since the events were related to the Order's humanitarian activities, in this case a fundraising campaign for building a new hospital, the Order's activities did not fall within the court's jurisdiction, despite the events having taken place on Italian territory. The Order's legal personality thus stems from its mission, which in turn acts as the defining limit to its prerogatives, distinguishing it in nature and scope from that of States. The Order's peculiar status and position may not be solely explained by its mission, however.

D. A Territorial Relic

The existence of a residual dimension to the Order's sovereignty is perhaps more controversial, although it should be understood as a logical component of the Order's position

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[45] Sovereign Order of Malta, *Mission*, available at www.orderofmalta.int/sovereign-order-of-malta/mission/.

[46] Arthur C. Breycha-Vauthier, 'The Order of St. John in International Law - A Forerunner of the Red Cross', 48 *American Journal of International Law* (1954) 554, at 562.

[47] *See*, for instance, *Association of Italian Knights of the Sovereign Military Order of Malta* v. *Guidetti*, 18 March 1999, Italy, Court of Cassation.

[48] *Ibid.*, discussed in Benedetto Conforti et al. (eds.), *The Italian Yearbook of International Law – Volume IX - 1999* (1999), at 154–155.

in international law.[49] It is rooted in the uniqueness of the Order's position. Why, for instance, has the International Committee for the Red Cross (ICRC) not attained a similar status to that of the Order of Malta? Both share a relatively similar mission and long history, and if one adopts an exclusively functional approach to the Order's sovereignty, it might be natural for the ICRC to also benefit from such sovereignty.

The existence of 'residual' sovereignty may offer an answer to this question. In other words, to fully explain the Order's status, one should also account for the Order's former territorial claims. The fact that the Order formerly possessed full statehood, with the requisite territory, population, and government that statehood typically entails, would signify that the Order's current status is also partly a result of a 'downgrade' from a general to a particular subject of international law. Thus, from being able to enjoy full legal personality, the Order's sovereignty was effectively stripped down to what it needed to accomplish its mission. The fact that the transition happened in this precise direction is what is conveyed by the idea of residual sovereignty; i.e. the former existence of territorial sovereignty.

The downwards transition from statehood, in contrast to the possibility of its occurring as an 'upgrade' from an extraterritorial entity, might also explain the broad acceptance by other States of the Order's sovereignty and its other State-like characteristics. The almost-impossible-to-fulfill condition to attain this status means that the Order's potential to be used as a dangerous precedent is negligible. For instance, such a threshold signifies that a secessionist region could not invoke the Order's existence and privileges as a precedent. The continued international personality of the Order also represents a favor done to a former 'club member' if one thinks of States as members of an exclusive club. States seem likely to be more tolerant towards a State's legal personality transitioning from general to particular.

Additionally, it should be noted that the ICRC's status is directly rooted in the mandate it is given under the Geneva Conventions regime.[50] Its existence and activities are thus not independent, strictly speaking, from the devolved sovereignty of States. This contrast between the mandate given to an independent private organisation and the Order's self-defined mission

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[49] Breycha-Vauthier, for instance, disagrees with this approach to the Order's sovereignty, emphasizing instead the Order's unique legal personality, regardless of its past territorial claims: '[…] the status of which [the Order of Malta] depended on supra-national membership and activity, the past existence of its varied territorial sovereignty having no determining power.' Breycha-Vauthier, *supra* note 47, at 561.

[50] International Committee of the Red Cross, *Mandate and Mission*, available at www.icrc.org/en/who-we-are/mandate.

is at the core of the standalone existence of the Order, and thus of its sovereignty and legal personality.

E. Other Religious Orders

The Order of Malta is not the only religious order to have claimed to be a subject of international law. In fact, the Order of Santa Maria Gloriosa attempted in 1978 to claim a similar status and the tax exemption it entailed under Italian jurisdiction.[51] This attempt was unequivocally rebuffed by the Italian Court of Cassation, which emphasized the unique sovereignty of the Order of Malta.[52] Despite the singularity of the SMOM among other religious orders, the various and often contrasting positions of the latter can support and clarify some of the elements of the Order's sovereignty.

An argument supporting the existence of the Order's functional sovereignty can be found in its fate compared to that of other religious orders of the Catholic Church, such as the Order of Brothers of the German House of Saint Mary in Jerusalem (known as the Teutonic Order) for instance. While there was a time when several religious orders maintained territorial claims and legal personality, the SMOM is the only one to have retained this status to this day.[53]

As argued convincingly by Breycha-Vauthier, the Order's sovereignty is anchored predominantly in its humanitarian mission. If the SMOM repudiated its mission, and/or became an exclusively religious order in mission, it would lose its sovereignty as a result.[54] This clearly distinguishes it from other Orders, which were, or have become primarily religious in nature.

The existence and history of other religious orders can also add to the understanding of the Order's residual sovereignty. As Cox emphasizes, its mission cannot solely explain the Order's sovereignty, at least for the first centuries of its existence. The possession of Rhodes,

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[51] This was clarified in a 1978 by the Italian Court of Cassation. *See Ministero delle Finanze* v. *The Association of Italian Knights of the Order of Malta*, 1978, Italy, Court of Cassation, cited in Kovacs, *supra* note 22, at 48.

[52] *Bacchelli* v. *Commune di Bologna*, 1978, Italy, Court of Cassation, cited in *Ibid.*

[53] Breycha-Vauthier, *supra* note 47, at 562.

[54] *Ibid.*

and subsequently Malta, provided the territorial anchor needed for the Order to assert its international personality.[55]

This is highlighted by the examples of other religious orders, such as the Iberian Orders or the Knights Templars, which were not granted sovereign status, while the Teutonic Order was, due to its territorial claim over Prussia.[56] Hence, territorial sovereignty also clearly played a role in asserting the legal personality of the Order. While the SMOM has relinquished all claims to its former possessions, the shadow of territorial sovereignty still plays a role in legitimizing the legal personality of the Order, though admittedly a discreet one.

F. Contested Sovereignty

While the arguments raised above concerning the roots to the Order's sovereignty might explain its peculiar status in international law, some doubts have been raised as to the effective nature of that sovereignty. In particular, the close links between the Holy See and the SMOM have been identified by Karski as intrinsically incompatible with the notion of sovereignty, since the Holy See maintains a substantial amount of formal and effective control over the Order's internal functioning.[57] More precisely, since the Order of Malta is a religious order of the Catholic Church, it is formally subordinated to the authority of the Holy See, which could block the election of a new Grand Master, for example. The last instance of such action by the Holy See lasted from 1951 to 1961. Notably, however, there have been no further examples of such interference by the Holy See since then, and this process has been altered to in 1997 through a change in the Order's Constitutional Charter. The Grand Master's election is now communicated to the pope, rather than requiring his approval.[58]

The authority of the Holy See over the SMOM is also demonstrated by the unilateral creation of a Cardinalitial Tribunal in 1951. The tribunal composed of five cardinals appointed by the Holy See, was given the task to clarify the Order's position in international law and as a religious order, as well as its relationship with the Holy See. Although the tribunal

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[55] Noel Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem of Rhodes and of Malta', 13 *Australian International Law Journal* (2006) 211, at 218.

[56] *Ibid.*

[57] *See generally* Karski, *supra* note 38.

[58] Ivanov, *supra* note 26, at 14.

acknowledged the Order's mixed nature as both a religious order and a functionally-sovereign, quasi-State entity of international law,[59] Karski instead argues that the extensive, unilateral authority of the tribunal over the Order means that the Order's sovereignty is effectively meaningless:

> Had the Cardinalitial Tribunal decided at the time that the Order should be dissolved, the dissolution would have taken place. If it had concluded that the Order's autonomy was to be abolished, the decision would have been implemented.[60]

The possibility for the Holy See to unilaterally dissolve the Order exists to this day, and it currently holds the power to confirm changes to the Order's constitutional charter. This, according to Karski, disqualifies the Order from using the term sovereign, since its constitution must be approved externally.[61]

However, this exact type of relationship between two sovereign entities, where the head of one must approve changes to the other's constitutional order is not unprecedented when it comes to States. Although admittedly within the context of a different legal tradition, the past and present relationship between the United Kingdom and some of its dominions, e.g. Canada, bears some similarities to the one that exists between the Order of Malta and the Holy See.

Until 1982 the Canadian constitution was a British law,[62] thus ensuring its supremacy over Canadian laws. To modify its content, the Canadian parliament had to request that the British parliament change the text of one of its own Acts. In theory, the British parliament could thus have unilaterally dissolved Canada. In fact, even the position of prime minister of Canada is heavily reliant on the use of the Queen's royal prerogatives over the Canadian legislative assembly to govern and exercise executive power.[63] Crawford also highlights that this type of arrangements is not incompatible with the notion of sovereignty: 'a State may continue to be

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[59] Extract translated by Breycha-Vauthier from the text published in the *Acta Apostolica Sedis*, 30 November 1953, pp. 765-767. *See* Breycha-Vauthier, *supra* note 47, at 561–562.

[60] Karski, *supra* note 38, at 25.

[61] *Ibid.*, at 27.

[62] British North America Act of 1867, 29 March 1867.

[63] Stephen Brooks, *Canadian Democracy: An Introduction* (5th ed., 2007), at 233–234.

sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization.'[64]

Despite Canada's formal subordination to the United Kingdom and absence of direct control over its own constitution, there is little doubt that it was, and is, a fully-fledged sovereign State, even before the repatriation of its constitution in 1982. Hence, dismissing the Order's sovereignty on this basis may be too hasty. Conversely, the Order's relationship with an increasing number of States, and its uncontested treaty-making powers on issues related to its mission [65] instead point towards a confirmation of the Order's sovereignty. This being clarified, the value of the Order's position and status for the future of small island nations can be examined with a solid basis for discussion.

IV. A Blueprint for Survival

A. Modus Operandi

Transitioning into an NSSEIL is not a perfect solution for LLISs, nor is it likely to be the best way forward for all States whose existence is threatened by climate change. As explained earlier, proposed solutions centered on the agency of the populations in danger of being displaced, as well as pre-emptive frameworks of sustainable relocation, would undoubtedly provide a substantially better alternative.[66]

Recent migratory events have highlighted the difficulties related with prompting States to pro-actively welcome displaced persons. Moreover, current trends towards the securitization of migration[67] underlines the need for a 'hope for the best, plan for the worst' approach to migration. This is where the potential of NSSEIL as a model for LLISs becomes apparent. It should be clear that this article is not advocating for NSSEIL to become a 'solution' for

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[64] Crawford, *supra* note 35, at 33.

[65] Barbara Mielnik, *Ksztatrowanie Sic Pozapaiistwowej Podmiotowoki w Prawie Mirdzynarodowym* (2008), at 141, cited in Karski, *supra* note 38, at 26.

[66] The manner in which relocation might happen could affect substantially the well-being of those affected, as well as the success of the relocation, as highlighted by previous examples of relocation in the pacific region. *See* Gil Marvel P. Tabucanon, 'Protection for Resettled Island Populations - The Bikini Resettlement and Its Implications for Environmental and Climate Change Migration', 5 *Journal of International Humanitarian Legal Studies* (2014) 7. *See also* Gil Marvel P. Tabucanon, 'Social and Cultural Protection for Environmentally Displaced Populations: Banaban Minority Rights in Fiji', 21 *International Journal on Minority and Group Rights* (2014) 25.

[67] *See* Ng, *supra* note 18.

protecting migrants from LLISs, but rather for a palliative approach to the problem, a framework that would allow LLISs to keep on working in the best interest of their citizens.

Key to the relevance of the present option is also that it does not rely on a LLIS maintaining its statehood beyond the loss of territory. Avoiding doing so may prove crucial in a climate-changed world, were members of the international community to challenge a LLIS's statehood. With the context of this option's relevance clarified, a possible *modus operandi* can be outlined in two steps.

First, there could be a progressive dissociation between the legal entity that is the government of the low-lying island State and the physical elements of the State. This arrangement would emulate the SMOM's relationship with its various territorial possessions until the loss of Malta in 1798. While the nature of such a relationship is somewhat blurry, it could probably be best described as a 'personal union'[68] between the territorial sovereign State, and the non-State sovereign entity of international law, both existing in their own right, but cohabiting under the umbrella of that relationship.[69] Reaching back to the 18th century might seem far-fetched but this could also describe the current relationship between the Holy See and the Vatican City, the former being a NSSEIL and the latter a sovereign State. Both are distinct entities, even if the Holy See acts 'on behalf of the State of the Vatican City'.[70]

In the context of LLISs, this could take the form of a progressive dissociation between the government of the LLIS and its territorial jurisdiction. The governmental apparatus could emphasize its role as representative and guardian of its citizens and their culture. Differentiating the two entities by using distinct names and assigning specific spheres of activity could provide a practical means with which to highlight the coexistence of two entities under the same umbrella. As mentioned above, this would emulate the current relationship between the Holy See and the Vatican. Both are members of international organizations, in some cases simultaneously. The choice of which entity should access membership of an international organization is defined as follows by Ryngaert:

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[68] D'Olivier Farran, *supra* note 23, at 224. For an overview of the co-princes arrangement that governed Andorra until 1993, *see* William Thomas Worster, 'Relative International Legal Personality of Non-State Actors', 42 *Brooklyn Journal of International Law* (2016) 207, at 258.

[69] Cedric Ryngaert, 'The Legal Status of the Holy See', 3 *Goettingen Journal of International Law* (2011) 829, at 832.

[70] Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1996), at 400. *See also* Ryngaert, *supra* note 70, at 832.

> The Vatican acts internationally in the field of more technical matters that are closely tied to the practical needs of the Vatican City State. In contrast, the international competence in spiritual matters, e.g. human rights and peace and security belongs rather to the Holy See. This explains why the Vatican State rather than the Holy See is a member of the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Telecommunications Satellite Organization (INTELSAT), EUTELSAT, UNIDROIT, the World Intellectual Property Organization (WIPO) and the International Grain Council, whereas the Holy See rather than the Vatican is a member of the Organization for Security and Co-operation in Europe (OSCE), the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, the Organization for the Prohibition of Chemical Weapons and - also – the WIPO. As the example of WIPO membership illustrates, the distinction between technical and non-technical matters is not watertight, however, and in any event, the Holy See construes its spiritual mandate rather broadly, by including the non-proliferation of weapons of mass destruction therein.[71]

Such a duplication in the international legal personality of the LLIS would thus not be unprecedented. It would allow the flexibility necessary for the LLIS to retain the whole of its international legal rights and duties as a State, with the added benefit of strengthening those most crucial to the possible future role of protection and advocacy of an LLIS existing as an NSSEIL.

As highlighted in the discussion on the functional nature of the SMOM's sovereignty, it would be crucial for a putative NSSEIL LLIS to outline its mission. Such mission might emphasize the protection of the rights and interests of those represented, as well as their culture and traditions. Depending on the outcome of relocation, whether the entire population of the former LLIS were relocated together or dispersed, the former government of an LLIS would have a role to play, although perhaps not as a government under the traditional understanding of the term.

The last step would be triggered when the LLIS's claim to statehood would be challenged. Regardless of the exact moment this might occur, a time will come when the status of the LLIS would come into question, to the point where the LLIS would no longer be able to

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[71] Ryngaert, *supra* note 70, at 835–836.

sustain a solid claim to full statehood. The legal significance of such a challenge would substantially diminish if the LLIS's government had already secured an independent legal personality as an NSSEIL. The loss of statehood would not affect the LLIS's membership in international organizations, or erase other States' obligations towards it.[72] The differentiated personality between the territorial State and the NSSEIL government would ensure that the doubts surrounding the LLIS's statehood would not affect its capacity to interact with other States on an equal basis, at least on matters related to its mission. Such an equal to equal basis in international relations might be essential in safeguarding the rights of displaced populations, as well as in ensuring that the rights of the State were secured. Financially, this would provide a platform from which an LLIS could defend itself against possible legal challenges to its various assets and claims, provided the transition to NSSEIL was done to ensure continuity.

B. Assessing the 'NSSEIL Option'

The challenges faced by LLISs are unprecedented and the solutions required to rise to them require both creativity and a willingness to explore uncharted waters. Furthermore, the unfolding of future events is shaped by our understanding of the present, particularly in terms of the law. Pending the implementation of an effective and durable solution, there will always be value to disposing of a variety of solutions. Conversely, this means that the relevance of the different proposed solutions can be best appreciated in relation to the respective contexts within which they have potential value. The numerous variables at play in the future of LLISs may eventually result in considerable uncertainty. A wide array of measures, ranging from *in situ* adaptation to extensive planning will likely come into play to mitigate this uncertainty and hopefully prevent harm to the vulnerable population. Ultimately, however, even if worst-case scenarios can be avoided, it may prove useful to have a failsafe in the event that better solutions cannot be implemented, particularly in the event a LLIS does not succeed in maintaining its claim to statehood beyond the loss of its territory.

Transitioning into an NSSEIL would signify a downgrade in status, with a consequent loss of rights and duties. The very flexibility of such a transition and new status also imply a lack of solid legal framework to anchor this new legal personality. Indeed, there can be no assurance

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[72] Wong, *supra* note 7, at 350.

that this 'NSSEIL Option' is itself failsafe. However, this also constitutes a strength as it relies only minimally on affirmative action by other members of the international community. Maintaining statehood beyond the loss of its physical indicia could prove to be an uphill battle if challenged by other States, and the current failure of the international community to tackle climate change does not bode well for the future of LLIS. Numerous extralegal factors could result in such challenges, and the complex interactions between States are far from always driven by morality and pure good will. Herein lies the value of the present 'NSSEIL Option': possessing legal personality beyond statehood could allow a deterritorialised LLIS to pursue its essential role in representing and protecting its displaced population. Furthermore, this task would be assisted by the ability to participate in international law-making,[73] the enjoyment of sovereign immunity for its head of 'State', the right of legation, and the possibility to retain its membership in international organizations.[74]

Not relying on statehood could also avoid the possible relativization of the legal personality of a deterritorialised LLIS. As emphasized by McAdam, the statehood of a hypothetical deterritorialised LLIS would eventually become subjective, reliant on the recognition of other members of the international community.[75] While relying exclusively on recognition to substantiate statehood may result in a number of difficulties, perhaps the most problematic aspect of this approach relates to the possibility of this recognition being disputed. If this were the case, the statehood of a deterritorialised LLIS could become a politically charged issue. In turn, this could easily result in a claim to statehood being more a problem than an asset for a LLIS trying to protect its displaced population. While this could also apply to a NSSEIL LLIS, if done properly the transition towards a new type of legal personality could assert the status of the entity before the loss of physical indicia and thus shield it against such challenge to its existence. Hence, even if statehood is usually seen as the holy grail of international legal personality, it may also come with substantial shortcomings once its traditional requirements go unfulfilled.

Although perhaps preferable in terms of the guarantees they may provide, bilateral or multilateral treaties also suffer from several shortcomings. The inherent complexity of negotiating such agreements is compounded by the context in which these negotiations might

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[73] Worster, *supra* note 69, at 256.

[74] Costi and Ross, *supra* note 4, at 125.

[75] McAdam, *supra* note 9, at 9.

take place. Climate change is unpredictable and liable to move faster than expected. Most States are already facing environmental pressure and will have to bear a growing burden by the time such agreements are needed. Even then, however, the option of transitioning to NSSEIL may provide a useful starting point to discussions on the legal personality of a deterritorialised LLIS.

Indeed, were no solution to be implemented to prevent the loss of status, the option of a deterritorialised LLIS becoming a *sui generis* entity of international law is sometimes mentioned.[76] However, instead of framing it as a purgatory or a perpetual limbo, this article explores what embracing this option could signify for a deterritorialised LLIS. Contextualized and assessed in relation to other proposed solutions, it seems that becoming a NSSEIL could provide a solid platform for advocacy and might help a former LLIS maintain its network of international relations.

The exact extent of what an NSSEIL LLIS could do in practice under this status is hard to delineate, since it may rely substantially on the *raison d'être* of the entity. The SMOM's interactions with Italian courts illustrate perfectly the decisive role of its humanitarian mission in defining the scope of its sovereignty. Here the *modus operandi* outlined in this article would create a transitional period during which the NSSEIL could be shaped into its desired form while still benefiting from the weight of statehood to strengthen the nature and scope of its mission.

Indeed, the weight of statehood could be crucial for as long as it exists to limit external influences. International legal personality is largely a relative concept, defined by the entity in question's interactions with other members of the international community. However, as inter-State interactions are largely dependent on the actors involved and on a myriad of external and geopolitical factors, any solution for maintaining the legal personality of LLIS beyond the loss of territory essentially consists of building a strong case, for maintaining statehood or, as presented here, for allowing a transition towards NSSEIL. The ultimate success of any plan will largely be in the hands of other members of the international community. Herein perhaps lies the single strongest point of value that the SMOM's precedent provides for the future of LLISs. The peculiar position of the Order and its free-

[76] Burkett, *supra* note 11, at 356–357. Rosemary Rayfuse and Emily Crawford, 'Climate Change, Sovereignty and Statehood', 11 *Sydney Law School Legal Studies Research Paper* (2011) 1, at 10. Wong, *supra* note 7, at 350.

standing nature, removed from a founding agreement or any type of devolution, result in a very low threshold required by members of the international community to confirm a transition towards NSSEIL. In fact, the lack of a pretension to territorial sovereignty, as opposed to a State's, may reassure potential 'host' States that their own sovereignty would not be threatened by the NSSEIL LLIS, were they to provide it with a physical haven. This makes the NSSEIL option particularly relevant as a 'worst-case scenario' solution since one can assume that the failure of other more ambitious options may have been due to a lack of affirmative action and cooperation by other States.

It is not a stretch to assume that climate change will induce pressure on every State on our planet. While the impacts of climate change will vary substantially depending on a variety of factors, our highly integrated world has already shown that strictly local crises are a thing of the past. Hence, assessing the different options available to LLISs at present should also consider the deteriorating forecasts and de-stabilizing effects of the very crisis at the source of the predicament of LLISs. It may be tempting to isolate and compartmentalize the issue relating to LLISs, but this could be a disservice to those in danger of being displaced.

Ultimately, benefiting from a 'by default' option which could be implemented with relatively limited support from external actors can hardly be described as a bad thing. Even if this course is not ultimately adopted by an LLIS, it could prove useful as a starting point. Moreover, the range of the SMOM's status and prerogatives described above would provide a relevant option even as a primary option. The substantial flexibility it would provide could result in a highly adaptable, bespoke solution for an LLIS to continue existing beyond the loss of its statehood. In fact, there has been considerable emphasis on the importance of statehood and how it might accommodate a State without territory. However, regardless of exactly when and how the statehood of a deterritorialised LLIS begins eroding, unless it can secure a territorial jurisdiction the latter will eventually be reduced to carrying out tasks that an NSSEIL could perform. Its citizens having acquired other nationalities,[77] the activities of a hypothetical deterritorialised State would essentially equate those performed by the SMOM *mutatis mutandis*.[78] This shift in purpose is reflected in Rayfuse's conclusion on the

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[77] ICJ, *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, ICJ Reports 1955, 6 April 1955, 4.

[78] Most of the prerogatives exclusive to States such as voting and implementing laws, taxation powers or the monopoly on legitimate violence would be either irrelevant or unimplementable for a deterritorialised State after its population has migrated if a 'host' State does not allow the LLIS to exert these powers within the host State's jurisdiction.

possibility of deterritorialised statehood, deemed a transitional option.[79] Other alternatives, such as 'abstract States' inspired by the precedents of governments in exile,[80] or political trusteeships,[81] would also eventually face the same problem. A time would come when no former citizen of the LLIS would hold its effective citizenship, thereby removing the need and possibility for the ex-situ nation to provide diplomatic protection, since no one could effectively claim such a privilege.[82] As Wong explains:

> If the people were to be scattered in other states, they would presumably become part of that other state. Even accepting the "deterritorialised state", the population residing in other states would be subject to their jurisdiction. If dual nationality is obtained, "the presumption of diplomatic protection may gradually favour the State in which the person resides". The "deterritorialised State" would thus fulfil no real function in a legal sense: its principal role would likely become one of advocacy for its diaspora.[83]

In such a context, being able to participate in the creation of international customary law,[84] benefitting from sovereign immunity for its head of State and the right of legation, as well as membership in international organisations,[85] would constitute crucial assets in comparison to a possible complete loss of legal personality.

As maintaining the physical indicia of statehood becomes increasingly challenging, this option could dissociate the LLIS's legal personality from the unsubmerged parts of its territory, providing stability and a solid platform for its continued existence. This may prove decisive in securing help or loans to ensure the protection of the threatened populations. Indeed, the Order of Malta's longevity could also vouch for the stability and sustainability of this particular type of legal personality. Conversely, Alexander and Simon warn against prioritizing deterritorialised statehood at all cost and over other options:

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[79] Rosemary Rayfuse, 'W(h)Ither Tuvalu? International Law and Disappearing States', *University of New South Wales Faculty of Law Legal Studies Research Paper Series* (2009) 1, at 13.

[80] Rayfuse and Crawford, *supra* note 77, at 8.

[81] Burkett, *supra* note 11, at 363–367. S*ee also* Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?', 21 *Tilburg Law Review* (2016) 72, at 86. Wong, *supra* note 7, at 86–87.

[82] McAdam, *supra* note 12, at 136–137.

[83] Wong, *supra* note 7, at 385–386.

[84] Worster, *supra* note 69, at 256.

[85] Costi and Ross, *supra* note 4, at 125.

> As a result, continuing to formally recognise submerged states seems desirable because it appears to prevent displaced islanders from losing their cultural identity and legal rights, but in reality we will be creating an empty fiction that may impede a long-term solution.[86]

While it is clearly far from a panacea, the 'NSSEIL option' should not be dismissed outright simply because it does not secure statehood. Indeed, this might be the strongest point of this option: it does not rely on statehood. This article attempts to show that there are merits to considering the current position of the Sovereign Military Order of Malta as a framework for continued existence, and the Holy See's association with the Vatican City also demonstrates that statehood and an NSSEIL can harmoniously cohabitate.

Due to the absence of an 'expiry date' and the timeless nature of its hypothetical mission, an NSSEIL LLIS could reasonably retain international legal personality for as long as needed or desired. Were the submerged territories to resurface, an NSSEIL could also possibly regain territorial sovereignty over the recovered land area. This would avoid the creation of *terra nullius*, i.e. unclaimed land.[87]

Retaining international personality and playing an active role in the advocacy and protection of the culture and traditions of the displaced populations might play a major role in a post-relocation context. Appropriate protection of community rights and collective identity could also make a substantial difference in the relocation process.[88] Interestingly, collective identity is one of the pillars that allow the SMOM to thrive. As Burkett emphasizes: 'Indeed, this appears to be the most powerful binding force for the Sovereign Order of Malta, whose members remain bonded by history, spirituality, and service.'[89]

V. Conclusion

What the future holds for low-lying island States is uncertain. The challenges brought by the rise in sea levels and climate change must not be underestimated, and preparedness is key to

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[86] Alexander and Simon, *supra* note 9, at 25.

[87] This possibility, although mentioned in the context of a hypothetical government in exile scenario, is mentioned by Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty', 53 *Ocean & Coastal Management* (2010) 1, at 7–8.

[88] Park, *supra* note 1, at 20. *See also* Tabucanon, *supra* note 67.

[89] Burkett, *supra* note 11, at 369. It should be noted, however, that the SMOM can only issue diplomatic passports; it does not have nationals per se.

meeting them. The window of opportunity for this preparation is narrowing quickly, and the feeble efforts of the international community made thus far do not inspire confidence in the probability of an adequately planned and executed collective attempt to safeguard the rights of those who are most vulnerable. In the absence of a clear and unequivocal legal framework to address the challenges faced by Low-lying Island States, the need for exploring the different options available is pressing.

This is where the present article attempts to add to the current research. Beyond the loss of the LLIS's population and territory, it remains unclear exactly what would happen to its legal personality, as statehood has hitherto relied heavily on the concept of sovereignty and physical indicia. While this question requires a separate discussion, the fact that uncertainty remains at all is a reason to explore relevant alternatives if its statehood were to be challenged, and possibly lost, following the loss of its territory.

The possibility of a deterritorialised LLIS becoming a *sui generis* entity of international law is mentioned throughout the literature but has not been fully explored as an actual option for maintaining the international legal personality of an LLIS. By examining the extent and content of the Sovereign Military Order of Malta's unusual legal personality, this article charts some of the prerogatives available to an LLIS if it were to become a Non-State sovereign entity of international law. Using the SMOM (and the Holy See to a lesser extent) as a blueprint, the possibility of an LLIS becoming a NSSEIL can be laid out as a useful 'default' option to retaining legal personality, an alternative to other options that rely on the active support of other States.

While the 'NSSEIL option' is far from an ideal solution to retaining international legal personality, it deserves a place in the wide spectrum of solutions which have so far been discussed. Its merits and shortcomings, such as the loss of statehood and the low threshold of effort required from other States should be assessed in context, and its usefulness may simply lie in its existence as a contingency plan. Even if the existence of this option only succeeds in reducing uncertainty surrounding the continued legal personality of an LLIS, the 'NSSEIL option' will have played a role in confronting some of the challenges faced by the threatened States.

As the window for action narrows, the need for concerted action becomes increasingly urgent. While there is yey time for pre-emptive measures and *in situ* adaptation, the current response by the international community is far from sufficient to remove the need for contingency

plans. Even if one can hope that worst-case scenario solutions will not be needed, exploring such solutions now can be a constructive exercise since concrete solutions will undoubtedly be constructed on the theoretical foundations we lay today.